

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CURTIS T. HOLDEN,

Defendant.

No. CR-11-2064-RHW

**ORDER ADDRESSING PRETRIAL
MOTIONS**

A pretrial conference was held in the above captioned matter on October 16, 2012 in Yakima, Washington. The Defendant was present and represented by Phillip Wetzel. Assistant United States Attorney Aine Ahmed appeared on behalf of the Government. Before the Court were the parties' pretrial motions including motions *in limine*, discovery motions, and motions to dismiss, *inter alia*. ECF Nos. 78, 100, 106, 117, 122, 125, and 128. After reviewing the submitted material and relevant authority, and hearing from counsel, the Court is fully informed. This order memorializes and supplements the Court's oral rulings.

At the hearing, the Court also reserved ruling on Defendant's two pending Motions to Dismiss, ECF Nos. 100, 128. For the reasons set forth below, those motions are denied.

A. Defendant's Motion to Dismiss Count 41

In this motion, Defendant asks the Court to dismiss Count 41 for Violation of the Statute of Limitations. ECF No. 100. The Defendant argues that Count 41 should now be dismissed because the Second Superseding Indictment: (1) re-

ORDER ADDRESSING PRETRIAL MOTIONS * 1

1 alleges offenses previously dismissed by the Court in violation of the statute of
2 limitations, and (2) substantially alters and broadens the language of the original
3 Indictment, such that it does not relate back to the original Indictment and the
4 limitations period is not tolled. *Id.*

5 The Government argues the doctrine of continuing offenses is applicable, as
6 the Garden Village counts were part of an ongoing and continuing scheme to
7 defraud health care benefit programs that commenced on July 1, 2004, and
8 continued through August 10, 2010. The Government contends the last of the
9 Garden Village claims were paid in February of 2007, within the five year statute.¹
10 Finally, the Government asserts that revised Count 41 does not broaden the crimes
11 charged, but instead consolidates the charged behavior (multiple executions of the
12 scheme) into one count – to which the Defendant has been aware of since the filing
13 of the original Indictment. *See* Govt.’s Resp., ECF No. 109.

14 **1. Background**

15 In Revised Count 41, the Government consolidated 16 counts from the prior
16 Superseding Indictment, 15 of which were previously dismissed by the Court
17 *without prejudice*.² (emphasis added). The Government now charges Count 41 in
18 the Second Superseding Indictment as a single count. The Government asserts this
19 involves a continuing course of conduct that started on the same date of service as
20 alleged in the first two Indictments (January 6, 2006), and ended as a group of
21 claims on the date of the last payment received – February 27, 2007. Count 41 of
22 the Second Superseding Indictment reads:

23 ///

24
25 ¹The original Indictment was filed on April 21, 2011. ECF No. 1.

26 ²The Court did **not** dismiss Count 42 of the Superseding Indictment, as to patient
27 “L.B.” This Count was found to be within the limitations period, as payment for
28 the claim was not received until February of 2007. *See* ECF No. 61 at 4.

1 That on or about the date of service of January 6, 2006 and continuing
2 through the date of the last payment of claims submitted for that date
3 of service on February 27, 2007, in the Eastern District of
4 Washington, **CURTIS T. HOLDEN**, dba ADVANCED PODIATRY,
5 knowingly and willfully executed and attempted to execute the above-
6 described scheme and artifice to obtain . . . money owned by and
7 under the custody of Medicare . . . by submitting or causing to be
8 submitted claims for payment from Medicare which falsely
9 represented the service of an “Evaluation and Management” office
10 visit for patients seen at Garden Village . . . when, in fact, an
11 Evaluation and Management visit was not the service provided, all in
12 violation of 18 U.S.C. § 1347(2).

13 Second Superseding Indictment, ECF No. 68 at 12 ¶ 33.

14 **2. Authority and Analysis**

15 Defendant cites *United States v. Hickey*, in support of his argument that the
16 statute of limitations is not tolled where a superseding indictment “broadens or
17 substantially amends a charge in the original indictment.” 580 F.3d 922, 929-30
18 (9th Cir. 2009). In *Hickey*, the government superseded an intervening indictment
19 that had omitted charges from the original, and then re-alleged them in a third
20 superseding indictment. *Id.* at 929. The *Hickey* court held that the central focus in
21 determining whether tolling of the statute of limitations after an indictment is
22 superseded, and the original indictment is pending, hinges on fair notice to the
23 defendant. *Id.* Defendant argues the distinguishing factor here is the counts in his
24 case were actually dismissed by this Court’s Order. *See* Order Granting Def.’s
25 Mot. to Dismiss, ECF No. 61. He further argues that the Second Superseding
26 Indictment uses the word “patients” and extends the time period from one day to
27 over a year.³

28 ³ The Superseding Indictment differs from the Second Superseding Indictment as it
referenced a date of service of January 6, 2006, but did not include a payment end
date. The prior indictment alleged Defendant defrauded Medicare “by submitting
or causing to be submitted 17 separate claims for payment from Medicare” and

1 As stated above, the Court dismissed 15 of the 16 Garden Village Counts
2 without prejudice, finding that Count 42 of the Superseding Indictment survived
3 the limitations period. *Id.* Here, Defendant is on notice that revised Count 41 does
4 not broaden the crimes charged and relates back to the same set of facts as the
5 previous indictments, corresponding only to the period January 6, 2006 – February
6 27, 2007. ECF No. 68 at 12.

7 Further, as this Court noted in its prior Order, “[h]ad the Government
8 lumped all the Garden Village billings together and charged them as a single count,
9 perhaps it would qualify as a continuing offense and satisfy the statute of
10 limitations.” ECF No. 61 at 5 (citing *United States v. King*, 200 F.3d 1207, 1213
11 (9th Cir. 1999)). That is the exact scenario before the Court today, and the
12 Superseding Indictment adequately gives Defendant notice of the charges, as the
13 execution of the scheme did not extend past the limitations period. *See also United*
14 *States v. Hickman*, 331 F.3d 439, 447-48 n.8 (5th Cir. 2003) (citing *United States*
15 *v. Nash*, 115 F.3d 1431, 1441 (9th Cir. 1994)).

16 Therefore, the Court finds that like the defendant in *Hickey*, Mr. Holden had
17 adequate notice of the charges and potential counts against him. 580 F.3d at 929.
18 Revised Count 41 of the Second Superseding Indictment did not substantially
19 broaden or amend the original indictment. Because not all of the Counts were
20 previously dismissed, the original Indictment remains pending and the statute is
21 tolled. *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990). The Court
22 agrees with the Government, that execution of the scheme was complete by
23 February 27, 2007, within the critical period. Accordingly, Defendant’s Motion to
24 Dismiss Count 41 is denied.

25 ///

26
27 does not expose Defendant to any additional liability. *See* Superseding Indictment,
28 ECF No. 20 at 12 ¶ 33.

ORDER ADDRESSING PRETRIAL MOTIONS * 4

B. Defendant's Motion to Dismiss Counts: 1-6, 7-10, 11-13, 14-40, and 41

Defendant moves the Court to dismiss Counts 1-41, related to Health Care Fraud, 18 U.S.C. § 1347. Defendant now argues all counts relating to § 1347 should be dismissed because the Second Superseding Indictment “substantially and materially” broadened the charges against him. ECF No. 128. As in Defendant’s Motion to Dismiss Count 41, ECF No. 100, disposition of this issue turns on whether the original Indictment tolled the statute of limitations with respect to the Superseding Indictment.

Defendant argues the Grand Jury returned a Second Superseding Indictment on June 19, 2012. As such, the five year statute of limitations began to run on June 19, 2007. Defendant contends that Counts 1-41, allege offenses (payments received and processed) that occurred prior to this date. Defendant claims the Second Superseding Indictment completely altered the Government’s theory of the case. His rationale is that instead of facing 16 Counts arising from January 6, 2006, as charged in the Original and Superseding Indictments, he now faces “an unlimited number of claims” related to a scheme which continued from January 6, 2006 through February 27, 2007. ECF No. 129 at 3.

The Government argues Count 41 represents a single continuous scheme to defraud the Garden Village Nursing facility that began on January 6, 2006, and was not complete until at least February 27, 2007 – the date Defendant received final payment. Govt.’s Resp., ECF No. 133. The Government reasserts that Defendant was engaged in a continuing offense. *Id.* It contends the crime of health care fraud is complete upon the execution of a scheme, and each execution may be charged separately. *See United States v. Hickman*, 331 F.3d 439 (5th Cir. 2003); *citing United States v. Lemons*, 941 F.2d 309, 317 (5th Cir.1991); *United States v. De La Mata*, 266 F.3d 1275, 1287 (11th Cir.2001). Further, the Government argues that while each submission of a false claim is a different execution, it may bundle

1 different executions within one count and need not charge each execution
2 separately. *United States v. King*, 200 F.3d 1207, 1212-1213 (9th Cir. 1999). Thus,
3 because the execution of the scheme was not complete until February 27, 2007,
4 Count 41 falls within the limitations period.

5 Finally, the Government contends that Counts 1-40 of the Second
6 Superseding Indictment are identical to the previous Indictments and did not
7 substantially amend the original charges. Therefore, Defendant was on notice as to
8 the charges, and the Second Superseding Indictment did not violate the statute of
9 limitations.

10 **1. Authority and Analysis**

11 The central inquiry in any statute of limitations analysis is notice to the
12 defendant. *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990). Where the
13 allegation and charges are “substantially the same in the old and new indictments,”
14 there is a presumption the defendant is on notice of the charges against him, and
15 the limitations period tolled, as the original indictment remains pending. *Id.* Thus,
16 whether or not a superseding indictment broadens the offense, turns on whether the
17 Defendant “knows that he will be called to account for certain activities and [can]
18 prepare a defense.” *Id.*

19 Defendant relies on *United States v. Ratcliff*, 245 F.3d 1246 (11th Cir. 2001).
20 In *Ratcliff*, the Eleventh Circuit reversed the district court’s denial of a motion to
21 dismiss and vacated a judgment against a defendant convicted of drug smuggling
22 activities. *Id.* at 1255. In that case, the initial indictment alleged incidents that
23 occurred from late 1992 through April 1993 (a period of six to seven months).
24 However, a jury ultimately convicted Ratcliff by a superseding indictment that
25 charged conspiracies dating back to the 1980’s (a period of thirteen years). *Id.* at
26 1250. The court held that the charges contained in the superseding indictment
27 “materially broadened or substantially amended” the conspiracy charges against
28

1 Ratcliff, finding “[t]his is not a case in which the superseding indictment contains
2 slightly more detail in terms of overt acts.” *Id.* at 1254 (internal citation omitted).

3 The Court finds *Ratcliff* distinguishable from the instant case. Here,
4 Defendant is on notice of any and all potential claims and patients related to Count
5 41 of the Garden Village Counts. In fact, Defendant cannot claim he lacked notice
6 of the charges against him, as the Government provided a WIC Data Request
7 detailing all claims/patients which Drs. Lee, Holden, and Morton saw during this
8 period. *See* Govt.’s Ex. C, ECF No. 57-3; *see also* Transcript of Motion Hearing,
9 ECF No. 63 at 17 (noting that Exhibit C “shows all of the claims for this particular
10 group during that time period”). Thus, unlike the Defendant in *Ratcliff*, Dr. Holden
11 has been placed on notice of the charges against him allowing him to adequately
12 prepare a defense.

13 In sum, the Superseding Indictment did not “substantially or materially”
14 broaden the charges against the Defendant. As such, the original Indictment tolled
15 the limitations period on April 21, 2011, and Counts 1-41 allege offenses of which
16 the defendant was adequately on notice and is able to prepare a defense. All
17 executions of the scheme to defraud, Counts 1-41 of the Superseding Indictment,
18 are within the limitations period. Defendant’s Motion to Dismiss Counts 1-6, 7-10,
19 11-13, 14-40, and 41 is denied.

20 Accordingly, **IT IS HEREBY ORDERED:**

21 1. The Defendant’s Motion to Dismiss Count 41 for Violation of the Statute
22 of Limitations, ECF No. 100, is **DENIED**.

23 2. The Defendant’s Motion to Dismiss Counts 1-6, 7-10, 11-13, 14-40, and
24 41, ECF No. 128, is **DENIED**.

25 3. Defendant’s Motion in Limine Pursuant to FRE 404(b), FRE 702 and the
26 Confrontation Clause, ECF No. 78, and Second Amended Motion in Limine
27 Pursuant FRE 404(b), FRE 702 and the Confrontation Clause, ECF No. 106, are
28

ORDER ADDRESSING PRETRIAL MOTIONS * 7

1 **DENIED** as moot, with leave to renew, as the Government does not intend on
2 offering Exhibits 68-70, or 73-75 in its case-in-chief. If the Government wishes to
3 present rebuttal evidence based on these exhibits, it must make an offer of proof,
4 outside the presence of the jury at trial. In addition, Government's Exhibit 77 may
5 not be introduced until further foundation is developed, outside the presence of the
6 jury.

7 4. The Court reserves ruling on Defendant's Second Motion in Limine, ECF
8 No. 117. The Court finds that Government's Attachment A, ECF No. 127-1, is
9 tentatively not admissible, subject to what develops at trial. The Court notes that
10 the probative value is likely outweighed by its prejudice. The Court will revisit this
11 issue at trial and the Government may lay further foundation, outside the presence
12 of the jury. The Court also reserves ruling on the remainder of Defendant's
13 Motion, until further development of the evidence at trial.

14 5. The Government's Motion in Limine, ECF No. 125, is **GRANTED**. The
15 Defendant may not inquire into Dr. Morton's workplace experience with
16 employees that relates to improper sexual activity.

17 6. The Government's Motion to conduct a video deposition of a witness
18 scheduled for surgery during the trial, ECF No. 73, is **GRANTED**.

19 7. The Defendant's Motion for Discovery, ECF No. 122, is **GRANTED**, in
20 part. The Government shall continue to make all disclosures required by Rule 16,
21 *Brady, Giglio*, and the Jencks Act. The Remainder of the Motion is denied with
22 leave to renew.

23 ///

24 ///

25 ///

26 ///

27 ///

1 8. The parties are directed to **FILE** their Joint Proposed Jury Instructions on
2 or before **November 19, 2012**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order and forward copies to counsel.

5 **DATED** this 6th day of November, 2012.

6
7 *s/Robert H. Whaley*
8 **ROBERT H. WHALEY**
9 Senior United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28